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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARTIN MCNERNEY DEVELOPMENT,
INC.,

Cross-complainant and Appellant,

v.

GOLD RIVER CONTRACTORS,

Cross-defendant and Respondent.

A123564

(San Francisco City & County
Super. Ct. No. CGC-05-438748)

After appellant Martin McNerney Development, Inc. (McNerney) was sued as general contractor in this construction defect action, it filed a cross-complaint for indemnity against its various subcontractors, including the drywall subcontractor, respondent Gold River Contractors (Gold River). Nearly three years after the filing of the original complaint, Gold River moved for summary judgment, arguing that because the plaintiff had not alleged that Gold River's drywall work was defective, Gold River owed no obligation to indemnify McNerney. Construing the complaint, the trial court found no allegation implicating Gold River's work and granted the motion. We affirm.

I. BACKGROUND

On February 17, 2005, One Clarence Place Owners Association (the Association), a nonprofit organization formed to maintain and manage a San Francisco condominium building (the Property), filed a complaint against Martin Properties, LLC, the Property's owner at the time of construction. According to the complaint, within the prior three years the Association had become aware the Property had been defectively designed and

built. The defects were alleged to include, without limitation, “defective design, selection of materials and/or construction of exterior cladding, windows and sliding glass doors causing water intrusion, decay and damage; defective design, selection of materials and/or construction of roofs causing water ponding, intrusion and damage; defective design, construction and/or selection of materials for the framing of the structure causing interior wall and fixture cracking, bowing walls, and interior, exterior and sliding glass doors which do not open and close properly and keep out drafts; defective design, construction and/or selection of materials for plumbing and sewage causing backups, spills, and leaks; defective design, construction and/or selection of materials causing poor ventilation and mold growth; defective design, construction and/or selection of electrical equipment causing dimming lights, wires which trip, dead switches, and fire and fire damage; defective design, construction and/or selection of mechanical equipment causing an inability to heat units appropriately and malfunctioning thermostats; defective design, selection of materials and/or construction of the entry gate causing unreasonable and excessive maintenance and repair costs and replacement charges; and defective design, construction and/or selection of the drainage and landscaping materials causing flooding, excessive concrete cracking, and dead plants.” The complaint added, “Plaintiff is informed and believes and thereon alleges that the Subject Property may be additionally defective in ways and to an extent not yet precisely known, but which will be inserted herein by way of amendment or will be established at time of trial, according to proof.”

The trial court assigned a special master to supervise the lawsuit and, on February 23, 2006, about one year after filing of the complaint, the special master issued his first pretrial order. The order declared that the special master would assume responsibility for all discovery-related matters and stayed discovery among the parties, except upon an application supported by good cause. The stay did not apply to discovery against nonparties and was subject to several exceptions. The parties were required, for example, to produce into a depository all documents relating to the Property’s construction and to respond to specified “Insurance” and “Scope of Work” interrogatories. The Association was required to submit the Property to “destructive

inspections and testing,” which all parties were permitted to observe. In addition, the Association was required to prepare and serve on the other parties a “detailed ‘Preliminary Statement of Claims, Defects and Damages’ alleged to exist at the [Property.]” The statement was “subject to reasonable revisions” as investigation, discovery, and testing progressed and could not be used in discovery or as evidence at trial. Following entry of the pretrial order, there were “numerous site inspections, invasive testing, and expert meetings,” notwithstanding the stay of discovery.

More than two years after filing of the complaint, in August 2007, the Property’s general contractor, McNerney, was joined as a Doe defendant. McNerney soon after filed a cross-complaint for indemnity, joining as cross-defendants several other parties it alleged were subcontractors on the Property construction work, including Gold River. By that time, Gold River had long been a participant in the lawsuit, since it was joined in 2005 as a cross-defendant in a cross-complaint for indemnity filed by the original defendant, Martin Properties, LLC.¹

In December 2007, nearly three years after filing of the complaint, Gold River filed a motion for summary judgment on the cross-claims of Martin Properties, LLC and McNerney.² The motion argued that Gold River’s work on the Property was not alleged in the complaint to be defective and therefore could not result in an obligation to indemnify. According to the evidence submitted with the motion, under its subcontract Gold River was to perform “the Drywall Work” at the Property, which entailed providing “all labor, services, materials, installation, . . . and other facilities of every kind and description required for the prompt and efficient execution of the work.” After Gold River installed the drywall, its work was inspected and approved by McNerney, and it was paid in full. It had never been given notice of any defect in its work. Further, the

¹ Martin Properties, LLC is not a party to this appeal.

² The connection, if any, between Martin Properties, LLC and McNerney is not clear from the record. We assume the two entities are closely enough related that McNerney’s relatively late joinder was not a source of prejudice in opposing Gold River’s summary judgment motion. In any event, no claim of prejudice on this ground was made.

motion argued, the complaint's defect allegations made no mention of drywall nor described a defect attributable to the drywall installation, and the complaint had never been amended to make such a claim.

McNerney's opposition to the motion for summary judgment claimed its pretrial preparation had determined Gold River's work "is implicated in one or more of the defect issues being asserted" by the Association and argued the complaint's allegation of "interior wall and fixture cracking" referred to defective work attributable to Gold River. McNerney's opposition was accompanied by a totally conclusory declaration by a "general contractor expert" retained by McNerney. Although the declarant asserted personal knowledge of "the facts set forth herein," he gave no further explanation of his background or expertise or of the manner in which he reached the conclusions set out in the declaration. Those conclusions asserted, in total, "The work of [Gold River] is implicated in the defects being asserted by plaintiffs. These alleged defects include corner bead separations."

Although the Association had asserted no legal claim against Gold River and was not a party to the motion for summary judgment, it also filed an opposition, arguing there were triable issues of fact regarding the existence of defects caused by Gold River's work. The Association's opposition was accompanied by the declaration of an architect who asserted he had inspected the ceiling of the Property's garage and found Gold River's installation of drywall was not in compliance with the terms of the contract. The Association did not, however, request leave to amend its complaint to assert this claimed defect as a basis for recovery. At oral argument on the motion, the trial court ruled the Association lacked standing to oppose the motion and declined to entertain its arguments or evidence.

The trial court granted the motion and adopted its tentative ruling, which read: "Neither the complaint nor the general contractor's cross-complaint alleged misconduct by [Gold River]. To the contrary, the only specific allegation [in the complaint] attributes the problem to 'defective design, construction and/or selection of materials for the framing of the structure' as the cause for the interior wall and fixture cracking. These

allegations do not implicate the drywall work of this cross-defendant. Neither [declaration submitted by McNerney is] admissible to establish that there is ‘a corner bead pops’ problem. Neither witness has provided a factual foundation for the contention made or the qualifications to give such an opinion. Cross-complainant’s request to allow plaintiff to amend the complaint is denied for lack of standing to make the request and as contrary to [Code of Civil Procedure] section 437c and for the further reason that any amendment appears to be barred by the 10 year statute of limitations.” A subsequent motion by Gold River seeking contractual attorney fees was also granted.

II. DISCUSSION

McNerney contends for a variety of reasons the trial court erred in granting summary judgment.³

We review the trial court’s grant of summary judgment de novo. (*Schachter v. Citigroup, Inc.* (2009) 47 Cal.4th 610, 618.) “In reviewing a ruling on a motion for summary judgment, an appellate court (1) ‘identif[ies] the issues framed by the pleadings,’ (2) ‘determine[s] whether the moving party’s showing has established facts which negate the opponent’s claim and justify a judgment in movant’s favor,’ and (3) ‘[w]hen a summary judgment motion prima facie justifies a judgment, . . . determine[s] whether the opposition demonstrates the existence of a triable, material factual issue.’ ” (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1252–1253.) “The materiality of a disputed fact is measured by the pleadings [citations], which ‘set the boundaries of the issues to be resolved at summary judgment.’ ” (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250.)

In determining Gold River’s indemnity obligation under its subcontract with McNerney, we apply the same rules of contract interpretation applied to any other contract. (*Crawford v. Weather Shield Mfg, Inc.* (2008) 44 Cal.4th 541, 552.) “Effect is to be given to the parties’ mutual intent [citation], as ascertained from the contract’s

³ The Association had originally filed an appeal of the judgment in this matter, but at its request we dismissed the appeal in an order dated September 28, 2009.

language if it is clear and explicit [citation]. Unless the parties have indicated a special meaning, the contract's words are to be understood in their ordinary and popular sense.” (*Ibid.*)

We find no error in the trial court's conclusion that the complaint states no claim giving rise to an obligation to indemnify by Gold River. The Association's action sought to recover for a variety of construction defects resulting from the work of McNerney and its subcontractors. Gold River was responsible for supplying and installing the drywall. Under its contract with McNerney, it had agreed to indemnify McNerney for “all work which is covered by or incidental to this contract.” Accordingly, Gold River was required to indemnify McNerney against any claim of defect in the drywall or its manner of installation.

Taking the complaint as the measure of the Association's claims, as we are required to do (*Turner v. Anheuser-Busch, Inc.*, *supra*, 7 Cal.4th at pp. 1252–1253), we find no claim for which Gold River is responsible to indemnify. While the complaint alleges a wide variety of construction defects at the Property, none of them mentions or concerns a defect in the drywall or its installation.

McNerney first contends that the complaint's reference to “cracking [and] bowing walls” constitutes an indemnifiable claim because Gold River's installation is “connected” to this allegation. A full reading of the allegation, however, demonstrates that the alleged defect is not in the drywall: “*defective design, construction and/or selection of materials for the framing of the structure* causing interior wall and fixture cracking, bowing walls, and interior, exterior and sliding glass doors which do not open and close properly and keep out drafts.” (Italics added.) The alleged defect is in the framing of the structure; cracked and bowing walls are merely a consequence of the defective framing, not a defect themselves.

Gold River did not have an obligation to indemnify McNerney against the consequences of the alleged defect in the framing merely because some of those consequences involved the drywall. (See *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 645–646 [the consequences of a defect are distinct from the defect itself].) Under

the subcontract, Gold River was only required to indemnify for claims attributable to “work which is covered by or incidental to this contract.” Accordingly, to trigger the indemnity clause, the Association must have asserted a claim for loss attributable to the “work,” i.e., to the drywall or its installation. McNerney’s theory, which it characterizes as requiring indemnity for any claim “connected to” the drywall, would force Gold River to reimburse McNerney for any loss to the drywall, whatever its cause, rather than loss attributable to the “work,” as required by the terms of the contract. In so doing, it would convert the indemnity agreement into an insurance agreement.

McNerney argues that because the indemnity agreement was a “Type I” agreement under *MacDonald & Kruse, Inc. v. San Jose Steel Co.* (1972) 29 Cal.App.3d 413, 419, a type requiring indemnity even for the negligence of the indemnitee without a showing of fault by the indemnitor, Gold River must indemnify it against any claim involving the drywall. In focusing on the respective fault of the parties, however, McNerney misses the point. For an indemnity obligation to arise, there first must be some fault connected with the contract containing the indemnity provision. Because there is no allegation the walls cracked and bowed because of a defect in the selection and installation of the drywall—as opposed to the unwarranted forces exerted on the walls as a result of defective framing—Gold River owes no obligation of indemnity for the alleged damage to the walls.

In its argument on this point, McNerney relies heavily on *Continental Heller Corp. v. Amtech Mechanical Services, Inc.* (1997) 53 Cal.App.4th 500. In that case, however, it was undisputed the cause of the loss was an act carried out under the contract. (*Id.* at p. 505.) For that reason, *Continental Heller* is irrelevant to the issues raised by Gold River’s motion. The same is true of *Centex Golden Construction Co. v. Dale Tile Co.* (2000) 78 Cal.App.4th 992, another case cited by McNerney, in which there was a claim the defendant’s tile work was defective. (*Id.* at p. 995.) While it is true, as McNerney argues, cases have awarded indemnity where the indemnitor was not negligent, there are no cases awarding indemnity where there was no allegation of fault at all regarding the particular work at issue.

McNerney next argues the language of the complaint, even if it contains no express allegation of defect attributable to Gold River, was sufficiently specific to meet the standard of Code of Civil Procedure section 425.10, subdivision (a), which governs the pleading of complaints and cross-complaints. Section 425.10 provides: “(a) A complaint or cross-complaint shall contain both of the following: [¶] (1) A statement of the facts constituting the cause of action, in ordinary and concise language. [¶] (2) A demand for judgment for the relief to which the pleader claims to be entitled. . . .” Under the section, “the complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts.” (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 550.) There is no doubt that, as to McNerney, the allegations of the complaint were more than adequate to state a claim. As quoted above, the complaint contains a litany of allegations of defect. As general contractor, McNerney was responsible, directly or indirectly, for these defects. As to Gold River, however, the allegations of the complaint were entirely bare. The sufficiency of the complaint as to McNerney provides no ground for denying Gold River’s motion.

McNerney also objects that the trial court erred in refusing to consider declarations filed by it and the Association asserting Gold River’s work was defective. Even disregarding the obvious evidentiary flaws in the expert declaration submitted by McNerney, evidence of defects in Gold River’s work was irrelevant to this motion. The issue before the trial court was not whether Gold River had rendered defective workmanship at the Property. Rather, the issue before the court was whether the Association had asserted a *claim* of defective workmanship by Gold River, thereby triggering Gold River’s indemnity obligation. The measure of the Association’s claims was the allegations of the complaint, not evidence of Gold River’s workmanship.⁴ As long as the Association’s claims did not include an allegation of defect by Gold River, it did not matter whether, *as a matter of fact*, Gold River’s workmanship was defective.

⁴ For this reason, the trial court’s decision not to entertain the Association’s opposition papers made no difference to the outcome of the motion. We therefore do not address McNerney’s argument that the Association had standing to oppose the motion.

This is consistent with the general approach required of a trial court in ruling on a motion for summary judgment. On such a motion, “ ‘The function of the pleadings . . . is to delimit the scope of the issues: the function of the affidavits or declarations is to disclose whether there is any triable issue of fact within the issues delimited by the pleadings.’ [Citations.] The complaint measures the materiality of the facts tendered in a defendant’s challenge to the plaintiff’s cause of action.” (*FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 381.) As a result, summary judgment cannot be denied on a ground not raised in the pleadings. (*Bostrom v. County of San Bernardino* (1995) 35 Cal.App.4th 1654, 1663.) Had the trial court denied summary judgment on the basis of a defect proved by the Association or McNerney in their opposition papers but not alleged in the complaint, this fundamental rule would have been violated. If the Association believed Gold River’s work was defective in a manner not alleged in the complaint, its remedy was to amend the complaint to allege that defect, not to prove the unalleged defect in a declaration submitted in opposition to the motion for summary judgment. (*Id.* at pp. 1663–1664.) Despite opposing the motion, the Association did not seek leave to amend the complaint to allege Gold River’s defective workmanship.

McNerney argues the trial court should not have granted summary judgment because pretrial discovery had not been completed. While under some circumstances this might be a proper basis to oppose summary judgment, we find no abuse of discretion in the trial court’s decision to entertain this motion. (See, e.g., *Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 254 [trial court’s refusal to grant continuance of summary judgment motion on grounds other than Code Civ. Proc., § 437c, subd. (h) reviewed for abuse of discretion].) While McNerney places great weight on the special master’s stay of discovery, formal discovery was largely immaterial here. The pertinent issue is whether the Association had adequate time to locate and allege a defect attributable to Gold River’s work. Such a defect would be located by an inspection of Gold River’s work at the Property, not through discovery among the parties. Because the Association had access to the Property at all times, including the years prior to the filing of the complaint when it discovered the defects actually alleged, the Association had ample

time to evaluate Gold River’s workmanship. In addition, all parties had been provided access to the Property to conduct inspections and testing for well over a year prior to Gold River’s motion. Finally, the Association was required to focus on the existence of defects by the special master’s order that it prepare a statement of defects for distribution to the parties. The Association therefore had not just the time but also the motive to discover any defect in Gold River’s work and amend the complaint to allege a claim based on it. There was no abuse of discretion in the trial court’s decision not to defer the motion pending further discovery.

We find no merit in McNerney’s various claims that the trial court’s ruling was procedurally defective. There was no requirement, as McNerney seems to claim, that the trial court receive expert testimony before reaching a conclusion about the scope of Gold River’s work under the subcontract. The scope of work was adequately explained by the subcontract and Gold River’s evidence, and McNerney filed no materials to create a dispute of fact with respect to those explanations. To the extent the trial court’s decision rested on a “finding of fact,” as McNerney claims, there was no error because there was no dispute of fact with respect to that finding.

McNerney also argues the trial court erred in granting Gold River contractual attorney fees. Because McNerney’s arguments depend on its contention the trial court erred in granting the summary judgment, our affirmance of the trial court’s ruling on the summary judgment motion requires affirmance of the attorney fees award.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.